Abdul Jalal bin Ahmad and Ors v Pegawai Pemegang Harta Cawangan Negeri Sembilan and Ors

HIGH COURT (SEREMBAN) — CIVIL SUIT NO 22–29 OF 2002
LOW HOP BING J
27 SEPTEMBER 2004

Bankruptcy — Capacity of bankrupt — Competency to maintain action — Plaintiffs adjudged as bankrupts — Whether they have locus standi to pursue action — Whether bankrupt plaintiffs obtained sanction of Official Assignee — Whether subsequent letters from official assignee tantamount to consent — Bankruptcy Act 1967 s 38(1)

Civil Procedure — Parties — Locus standi — Application to strike out writ and statement of claim — Whether bankrupt plaintiffs obtained sanction of Official Assignee — Whether subsequent letters from official assignee tantamount to consent — Bankruptcy Act 1967 s 38(1)(a)

Civil Procedure — Pleadings — Striking out writ and statement of claim — Limitation period — Allegations of fraud — Whether serious questions of law to be tried — Limitation Act 1953 ss 6(1)(a), 9, 29(a), (b)

Civil Procedure — Appeal — Notice of appeal — Third plaintiff filed appeal on his own behalf and two others — Whether irregular — Whether defendants prejudiced — Whether exception to s 37(1)(a) Legal Profession Act 1976 applicable

Civil Procedure — Judgment — Default of defence — Setting aside — Whether judgment in default of defence irregular — Rules of the High Court 1980 O 19 r 7(1), (3)

This was an appeal by the plaintiffs against the decision of the registrar allowing: (i) the third and the fourth defendant's application in enclosures 11 and 23 respectively to strike out the plaintiffs' writ and statement of claim dated 18February 2002 pursuant to O 18 r 19(1)(b), (c) or (d) of the Rules of the High Court 1980 ('RHC'); and (ii) the third defendant's application in encl 30 to set aside the judgment in default of defence obtained by the plaintiffs on 14 July 2003 against him. The fourth defendant averred in his supporting affidavit that on 1 May 1992 he was appointed director of Seremban Bumi Tayar Sdn Bhd in order to financially assist the company. However, on 25September 1996 he resigned as director of the company and that during his tenure as director he had never signed any of the company's documents in that capacity. Further, he contended that before filing the writ the plaintiffs who had been adjudged as bankrupts had not obtained the sanction from the official assignee's office and therefore had no *locus standi* in this action. He also contended that the writ issued on 18 February 2002 was based on fraud allegedly committed in 1992 and was therefore statute-barred. The third plaintiff averred that sanction was obtained on 27 August 2003 and that the plaintiffs therefore had *locus standi*.

Held, allowing the plaintiffs' appeal in respect of encls 11 and 23 and dismissing the appeal in respect of encl 30 with each party paying its own costs:

(1) When the registrar made the orders on 27 January 2003, the plaintiffs had not obtained the official assignee's sanction. However, by letter dated 27 August 2003 the plaintiffs had obtained the said sanction. As such, s38(1)(a) of the Bankruptcy Act 1967 has been satisfied and the plaintiffs have the necessary *locus standi* to commence this action (see paras 15 and 16).

(2) In respect of the plaintiff's writ, statement of claim and the notice of appeal which were filed by the third plaintiff on his own behalf and also on behalf of the other two plaintiffs, the third plaintiff as a party was entitled to file these documents on his own behalf as this is expressly allowed as an exception to s 37(1)(a) of the Legal Profession Act 1976 (see para 17).

(3) A perusal of the notice of appeal revealed that it had referred to all the three orders made on the three enclosures in which case there was no reasonable likelihood of the defendants being prejudiced in any way whatsoever (see para 21).

(4) The issue of whether the 6 or 12-year limitation period would apply under ss 6(1)(a) and 9 of the Limitation Act 1953 respectively was a serious question of law to be tried (see para 25).

(5) The serious allegations of fraud which had been particularised have to be resolved after a full hearing in order to determine *inter alia* the application of the limitation period under s 29(a) or (b) of 1953 Act (see para 26).

(6) It is only in absolutely plain and obvious cases that a plaintiff's claim or a party's pleadings would be struck out under any of the limbs of O 18 r 19(1) RHC. Here, the plaintiffs failed to invoke O 19 r 7(1) and (3) in order to obtain a judgment in default of defence against the third defendant. The said judgment in default of defence was therefore irregular and ought to be set aside *ex debito justitiae* (see paras 38 and 50).

[**Bahasa Malaysia summary**

Ini adalah rayuan plaintif terhadap keputusan pendaftar yang membenarkan: (i) permohonan defendan ketiga dan keempat di dalam Lampiran 11 dan 23 untuk membatalkan writ plaintif dan pernyataan tuntutan bertarikh 18 Februari 2002 menurut A 18 k 19(1)(b), (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) permohonan defendan ketiga di dalam Lampiran 30 untuk mengetepikan penghakiman ingkar pembelaan yang didapatkan oleh plaintif pada 14 Julai 2003 terhadap beliau. Defendan keempat telah menegaskan di dalam afidavit sokongan bahawa pada 1 Mei 1992 beliau telah dilantik sebagai pengarah Seremban Bumi Tayar Sdn Bhd untuk menolong syarikat

dari segi kewangan. Walau bagaimanapun, pada 25 September 1996 beliau telah meletak jawatan sebagai pengarah syarikat dan ketika memegang jawatan tersebut, beliau tidak pernah menandatangani sebarang dokumen syarikat didalam kapasiti beliau sebagai pengarah. Seterusnya, beliau mengatakan sebelum memfailkan writ, plaintif yang telah dihukum bankrap tidak pernah mendapatkan sanksi daripada pejabat pegawai pemegang harta dan oleh itu tidak mempunyai *locus standi* kepada tindakan ini. Beliau juga mengatakan bahawa writ yang dikeluarkan pada 18 Februari 2002 adalah berdasarkan kepada fraud yang dikatakan dilakukan pada 1992 dan oleh itu dihalang oleh statut. Plaintif ketiga menegaskan sanksi yang telah didapatkan pada 21 Ogos 2003 dan oleh yang demikian plaintif tidak mempunyai *locus standi*.

Diputuskan, membenarkan rayuan plaintif berkenaan lampiran 11 dan 23 dan menolak rayuan berkenaan lampiran 30 dengan kos kepada setiap parti:

(1) Semasa pendaftar membuat arahan-arahan pada 27 Januari 2003 plaintif masih lagi belum mendapatkan sanksi daripada pegawai pemegang harta. Walau bagaimanapun, melalui surat bertarikh 27 Ogos 2003, plaintif telah mendapatkan sanksi tersebut. Oleh itu, s 38(1)(a) Akta Kebankrapan 1967 telah dipenuhi dan plaintif mempunyai *locus standi* yang sepatutnya untuk memulakan tindakan ini (lihat perenggan 15 dan 16).

(2) Berkenaan writ, pernyataan tuntutan dan notis rayuan plaintif yang difailkan oleh plaintif ketiga bagi pihak beliau sendiri dan mewakili kedua-dua plaintif yang lain, plaintif ketiga sebagai satu pihak berhak memfailkan dokumen-dokumen tersebut bagi pihak beliau sendiri dan ini dibenarkan sebagai pengecualian kepada s 37(1)(a) Akta Profesion Undang-Undang 1976 (lihat perenggan 17).

(3) Satu penelitian ke atas notis rayuan menunjukkan ia telah merujuk kepada ketiga-tiga arahan yang dibuat ke atas tiga Lampiran di mana tiada sebarang kemungkinan yang munasabah bahawa defendan diprejudiskan dengan apa cara sekalipun (lihat perenggan 21).

(4) Isu sama ada tempoh had masa enam atau 12 tahun terpakai di bawah ss 6(1)(a) dan 9 Akta Had Masa 1953 masing-masing adalah satu persoalan undang-undang yang serius untuk dibicarakan (lihat perenggan 25).

(5) Tuduhan fraud yang serius yang telah diperincikan perlulah diselesaikan selepas perbicaraan penuh untuk menentukan *inter alia* permohonan tempoh had masa di bawah s 29(a) atau (b) Akta 1953 (lihat perenggan 26).

(6) Hanya di dalam kes-kes yang biasa dan jelas tuntutan plaintif atau pliding sesuatu pihak boleh dibatalkan di bawah mana-mana cabang A 18 k 19(1) KMT. Di sini, plaintif gagal untuk menggunakan A 19 k 7(1) dan (3) untuk mendapatkan penghakiman ingkar terhadap defendan ketiga. Oleh itu, penghakiman ingkar pembelaan adalah diluar aturan dan perlulah diketepikan *ex debito justitiae* ((lihat perenggan 38 dan 50).]

Notes

For cases on competency of bankrupts to maintain action, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2032–2033

For cases on default of defence, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3265–3275

For cases on *locus standi*, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4276–4285

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1095–1100

For cases on striking out writ and statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4859–4891

For striking out pleadings and actions, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.6-069]–[10.6-075]

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417 (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Sdn [2002] 1 CLJ 405 (refd)

Knowles v Roberts (1888) 38 Ch D 263 (refd)

Leong Peng Kheong & Anor v Downtree Properties Sdn Bhd [2002] 2 MLJ 186 (refd)

Lian Keow Sdn Bhd v Chelliah Paramjothy & Anor [1988] 1 CLJ 57 (refd)

Mrs Kok Wee Kiat v Kuala Lumpur Stock Exchange Bhd & Ors [1979] 1 MLJ 71 (refd)

Roslan bin Abdullah v New Zealand Insurance Co Ltd [1981] 2 MLJ 324 (refd)

Sarjit Singh Khaira v Government of the State of Sarawak & Anor [1990] 2 CLJ 95 (refd)

Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2) [1967] 1 MLJ 46 (refd)

Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 33(1), 38(1)(a), (2)

Legal Profession Act 1976 ss 35(1), 37(1)(a)

Limitation Act 1953 ss 6(1)(a), 9, 29(a), (b)

Rules of the High Court 1980 O 8, O 18 r 19, (1)(b), (c), (d), O 19 rr 2, 3, 4, 5, 7, (1), (3), O 32 r 1, O 83 r 1

Gurdit Singh (Nassir & Co) for the third defendant

Ahmad Rosdi (Ahmad Rosdi & Co) for the fourth defendant

Low Hop Bing J:

I APPEAL

[1] This is an appeal in encl (32) lodged by the plaintiffs to me as judge in chambers against the decision of the learned registrar who had on 27 January 2003 allowed with costs the third and fourth defendant's applications in encl (11) and encl (23) respectively, to strike out the plaintiffs' writ and statement of claim dated 18 February 2002, pursuant to O 18 r 19(1)(b), (c) or (d) of the Rules of the High Court 1980; and the third defendant's application in encl (30) to set aside the judgment in default of defence obtained by the plaintiffs on 14 July 2003 against the third defendant (for brevity and convenience, all references to an order and a rule hereinafter are references to that order and rule of the Rules of the High Court 1980).

II FACTUAL BACKGROUND

Enclosure (11)

[2] The fourth defendant's application by way of summons in chambers in encl (11) is supported by his own affidavit alleging that on 1 May 1992, he was appointed a director of Seremban Bumi Tayar Sdn Bhd ('the company') in order to financially assist the company which however showed no improvement.

[3] On 25 September 1996, the fourth defendant resigned as a director of the company. During his tenure as such director, the fourth defendant said that he had never signed any of the company's documents in that capacity, as a result of which, the writ and statement of claim was wrongly commenced against him, and that the plaintiffs who have been adjudged bankrupts without any sanction from the official assignee's office, had no *locus standi* in this action.

[4] He added that the writ issued on 18 February 2002 and based on fraud allegedly committed in 1992 is statute-barred. In his affidavit in reply, the third plaintiff alleged that the fourth defendant should have raised the issue of sanction in the statement of defence and that the silence of the first defendant who is the official assignee is evidence of waiver. He added in his further affidavit that such sanction has been obtained by the plaintiffs on 27August 2003, in which case the plaintiffs have *locus standi* in an action based on fraud.

[5] The fourth defendant also alleged that the plaintiffs' action is statute-barred.

Enclosure (23)

[6] This application by way of summons in chambers was supported by the third defendant's affidavit alleging that the plaintiffs had been adjudged

bankrupts and hence in the absence of sanction have no *locus standi* to commence this action which he also alleged is statute-barred on the same grounds as in encl (11) above.

[7] The third defendant said that he has never signed any of the company's documents including letters of guarantee. He added that the company is a separate legal personality and that allegations of fraud were not particularised.

[8] The third plaintiff responded in his affidavit in reply, alleging that the plaintiffs have *locus standi* and that there are serious questions to be tried. He said that the action is not statute-barred.

Enclosure (30)

[9] This summons in chambers filed by the third defendant sought to set aside the judgment in default of defence dated 14 January 2003, on the ground, inter alia, that declaratory relief could not be given by way of judgment in default of defence and that on 19 November 2002, the learned registrar has made an interim order that the plaintiffs could not enter judgment in default of defence against the third defendant until the third defendant's application to strike out the plaintiffs' writ and statement of claim has been heard and that it is an abuse of the process of the court. There was no affidavit in support.

SUBMISSIONS BY PARTIES AND DECISION OF THE COURT

I ENCLOSURES (11) AND (23)

(1) Sanction and locus standi

[10] The plaintiffs who are unrepresented submitted that they have obtained the necessary sanction and hence have *locus standi.*

[11] It was also argued that the defendants who have entered unconditional appearance have waived their right to invoke O 18 r 19, relying on *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; and *Leong Peng Kheong & Anor v Downtree Properties Sdn Bhd* [2002] 2 MLJ 186.

[12] The third and the fourth defendants through learned counsel Mr Gurdit Singh and Mr Ahmad Rosdi respectively, contended on substantially the same grounds. They said that the notice of appeal in encl (32) was irregular as it was filed by the third plaintiff when there were three unrepresented plaintiffs, and since there were three separate orders, they should be three separate notices of appeal against each order.

[13] They added that the writ and statement of claim had been filed by the first plaintiff for himself and the other two plaintiffs who were unrepresented, which was not allowed on the strength of s 35(1) and s 37(1) of the Legal Profession Act 1976.

[14] They stressed that the plaintiffs being bankrupts who have not obtained the official assignee's sanction to commence this action lacked *locus standi* They relied on *inter alia,* s 38(1)(a) and (2) of the Bankruptcy Act 1967.

[15] In my judgment, it is necessary to observe that when the learned registrar made the orders on 27 January 2003, the plaintiffs have not obtained the official assignee's sanction. However, *vide* letter dated 27 August 2003, such sanction has since been obtained by the plaintiffs from the official assignee's office.

[16] In the circumstances, I hold that s 38(1)(a) of the Bankruptcy Act 1967 has been satisfied and that the plaintiffs have the necessary *locus standi* to commence this action.

[17] In respect of the plaintiffs' writ and statement of claim in encl (1) and the notice of appeal in encl (32) which were filed by the third plaintiff on his own behalf and also on behalf of the other two plaintiffs, I am of the view that the third plaintiff as a party is entitled to file these documents on his own behalf as this is expressly allowed as an exception to s 37(1)(a) of the Legal Profession Act 1976 which, where relevant, reads as follows:

37 No unauthorised person to act as advocate and solicitor.

(1) Any unauthorized person who —

(a) acts as an advocate and solicitor or an agent for any party to proceedings or in any capacity, *other than as a party to an action in which he is himself a party,* sues out any writ, summons or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the Courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such Courts;

(b) shall be guilty of an offence

(Emphasis added)

[18] Under s 37(1)(a), it is an offence for an unauthorized person to act as an advocate and solicitor or an agent for any party to proceedings or in any capacity, 'other than as a party to an action in which he is himself a party'.

[19] Since the third plaintiff is a party to the action herein and acting on his own behalf, there is nothing irregular in the writ and statement of claim as well as the notice of appeal which had been filed by him as a party.

[20] The writ and statement of claim has specifically referred to the first and the second plaintiffs who are the parties herein. The third plaintiff is entitled at least to appear in person, ie on his own behalf.

[21] A proper perusal of the notice of appeal reveals that it has referred to all the three orders made on the three enclosures in which case there is no reasonable likelihood of the defendants being prejudiced in any way whatsoever.

[22] I am therefore unable to uphold the defendants' contention pertaining to plaintiffs' writ and statement of claim and notice of appeal.

(2) Limitation and Fraud

[23] The stand taken for the plaintiffs was that the plaintiffs had 12 years to commence the action based on land transactions and allegations of fraud. They added that the action is not statute-barred.

[24] It was submitted for the third and the fourth defendants that the facts showed a 10-year lapse and so the six-year limitation period has set in, on the basis of s 6(1)(a) of the Limitation Act 1953.

[25] Having considered these submissions, I hold that the issues as to whether the plaintiffs' action may be construed as an action to recover land within the ambit of s 9 of the Limitation Act 1953 which sets a 12-year limitation period, or it is founded on a contract or tort so as to attract the six-year limitation period under s 6(1)(a) are serious questions of law which can only be determined after hearing *viva voce* evidence at the trial.

[26] Further, there are serious allegations of fraud which had been particularized and these particulars are to be resolved after full hearing, in order to determine, *inter alia,* the application of the limitation period under s29(a) or (b) of the same Act.

(3) Principles Governing O 18 r 19(1)(b),(c) or (d)

[27] Order 18 r 19(1)(b), (c) or (d) on which the third and the fourth defendants rely reads, where relevant, as follows :

19 Striking out pleadings and indorsements (O 18 r 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading ... on the ground that:

(a) …; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[28] In relying on O 18 r 19(1)(b), the defendants are in effect arguing that the plaintiffs' statement of claim is scandalous, frivolous or vexatious. In *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405, in the context of O 18 r 19(1)(b), I have the occasion to decide on the scope of the word 'scandalous' as meaning wholly unnecessary or irrelevant.

[29] As alluded to above, the fact that the plaintiffs have in their statement of claim brought the action against the defendants based on allegations of fraud relating to land transactions would require a full hearing in order to arrive at a proper conclusion.

[30] Hence, I am unable to hold that the plaintiffs' action is scandalous in the sense of being wholly unnecessary or irrelevant.

[31] Similarly, it cannot be said that the plaintiffs' action is frivolous or vexatious in the sense of being obviously unsustainable (see *Boey Oi Leng, supra*).

[32] At the stage of hearing an application to strike out a statement of claim on the ground that it is obviously unsustainable, the court would not decide on the strength of the plaintiffs' action. The defendants have a heavy burden to prove that the plaintiffs' action comes within O 18 r 19(1)(b) (see *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)* [1967] 1 MLJ 46; *Sarjit Singh Khaira v Government of the State of Sarawak & Anor* [1990] 2 CLJ 95 HC.)

[33] In respect of O 18 r 19(1)(c), the defendants must prove that the plaintiffs' statement of claim has included unnecessary pleading tending to prejudice, embarrass or delay the fair trial of this action by pleading beyond their right (see *Knowles v Roberts* (1888) 38 Ch D 263 at p 270 per Bowen LJ; *Malaysian High Court Practice* 1998 MLJ Desk Ed p 510 para [18.19.6].

[34] A pleading is embarrassing where it is not clear what is being pleaded: *Mrs Kok Wee Kiat v KLSE Bhd & Ors* [1979] 1 MLJ 71.

[35] Upon a proper perusal of the plaintiffs' claim, I am unable to conclude that it comes within O 18.

[36] Is the plaintiffs' action an abuse of the process of the court under O 18 r 19(1)(d)? An abuse of the process of the court can arise under O 18 r 19(1)(d) when for example, the plaintiffs' use of the process of the court herein is not *bona fide,* which does not appear to be the case herein as the plaintiffs have a legitimate right to initiate and pursue the action against the defendants.

[37] At this stage of the proceedings under O 18 r 19(1)(d), this court is not concerned with the plaintiffs' merits or chances of success in the action (see *Abdul Rahim Abdul Hamid & Ors v Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417).

[38] It has been stated ever so often by our courts that it is only in absolutely plain and obvious cases that a plaintiff's claim or action or a party's pleadings would be struck out under any of the limbs of O 18 r 19(1) (see eg *Roslan bin Abdullah v New Zealand Insurance Co Ltd* [1981] 2 MLJ 324).

[39] The weakness or demerits of the plaintiffs' action cannot ipso *facto* be a ground for striking out but it has to be proved, established or demonstrated that the specific requirements and terms contained in O 18 r 19(1)(b), (c) or (d)

have been satisfied. (See eg *Lian Keow Sdn Bhd v Chelliah Paramjothy & Anor* [1988] 1 CLJ 57; *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; *Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36).

(4) Entry of Unconditional Appearance

[40] I am unable to find any reply by the respective learned counsel for the third and the fourth defendants to the plaintiffs' contention that the defendants who have entered unconditional appearance have waived their right to invoke O 18 r 19.

[41] In my judgment, the defendants' absence of response is hardly surprising, in the light of the judgment of the then Supreme Court in *Alor Janggus, supra,* delivered by Jemuri Serjan CJ (Borneo) (as he then was) at p 258 to the effect that the defendants who have filed their unconditional appearance have thereby deprived themselves of the right to invoke O 18 r 19. (See also *Leong Peng Kheong, supra,* per Azmel J at p 192 E–F).

II ENCLOSURE (30)

[42] The plaintiffs' contention is that the plaintiffs' entry of judgment in default of the third defendant's defence is valid.

[43] The response of the third defendant is that such a judgment could not be entered against him as it was for *inter alia* declaratory relief.

[44] In my judgment, it is necessary to observe that the procedural law governing the entry of judgment in default of pleadings is to be found in O 19 r 2 to r 5 and r 7, and such a judgment may be given in the following circumstances:

(1) where the plaintiffs' claim is for a liquidated demand only (O 19 r 2);

(2) interlocutory judgment for damages to be assessed (O 19 r 3);

(3) interlocutory judgment:

(a) for the delivery of the property or the value to be assessed O 19 r4(a); or

(b) for the value of the property to be assessed 0 19 r 4(b); and

(4) for possession of the immovable property (other than a charge action under O 83 r l): O 19 r 5(1)

[45] None of the above applies to the factual background in the instant case. However, it would appear that O 19 r 7 is applicable here.

[46] Under O 19 r 7, where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in O 19 r 2 to r 5 above, eg for declaratory relief in this action, the plaintiffs may apply to the court for

judgment in default of defence, and on the hearing of the application, the court shall give such judgment as the plaintiffs appear entitled to on their statement of claim: O 19

[47] Such an application must be by summons or motion: O 19 r 7(3).

[48] Under O 32 r l, the summons must be summons in chambers in Form 62.

[49] If a plaintiff wishes to apply by way of a motion, he must invoke O 8 which contains general provisions regulating the use of originating or other motions.

[50] However, it is to be noted that the plaintiffs have failed to invoke O19 r 7(1) and (3) in order to obtain judgment in default of defence against the third defendant. In the circumstances, I hold that the judgment in default of defence is irregular and ought to be set aside *ex debito justitiae*. Hence, I hold that the learned registrar is correct in setting it aside.

III Conclusion

[51] On the foregoing grounds, I allow the plaintiffs' appeal against the orders of the learned registrar made in respect of encls (11) and (23). The orders of the learned registrar are hereby set aside.

[52] In respect of encl (30), I dismiss the plaintiffs' appeal and affirm the order of the registrar who has set aside the plaintiffs' judgment in default of defence.

[53] In the light of the above circumstances, I order that the parties herein are to bear their own costs, here and before the learned registrar.

[54] In view of the complexity of the action, the plaintiffs are certainly well advised to seek the services of an advocate and solicitor who is ready, able and willing to handle the action for them.

Ordered accordingly.

Reported by Vinod Kamalanathan